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Supreme Court of the United States

OCTOBER TERM, 1955

No. 372

CHINA DAILY NEWS, INC., EUGENE MOY, CHIN YOU GON and CHIN HONG MING,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PAUL L. ROSS,
MARTIN POPPER,
Counsel for Petitioners
China Daily News and Eugene Moy.

THOMAS RUSSELL JONES,
Counsel for Petitioners
Chin You Gon and Chin Hong Ming.

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Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on August 3, 1955.

I. (a) *Opinions below.* The Hon. Sylvester J. Ryan, District Judge for the Southern District of New York, before whom the case was tried without a jury, rendered no opinion. The opinion of the Court of Appeals is not yet officially reported. It is appended hereto, as prescribed in subparagraph (i) of Rule 23 of the Supreme Court Rules (pp. 26-29).

(b) *Jurisdiction.*

(i) The decision of the Court of Appeals was rendered on July 5, 1955.

(ii) Petition for rehearing was filed on July 20, 1955 and was denied on August 3, 1955.

(iii) Jurisdiction of this Court is founded on 28 U. S. C., § 1254(1).

(iv) Jurisdiction of the District Court was founded on 18 U. S. C., § 3231.

(c) *The ruling below and the reason for certiorari.*

The Court below erroneously rejected the contentions of the petitioners on a number of important issues affecting the validity of the judgments of conviction. At least two of these questions involve important issues of first impression in this Court. Certiorari should be granted because the Court of Appeals has decided two important questions of federal law, which have not been but should be settled by this Court.

1. The first question is whether there was a valid and subsisting delegation of authority by the President to the Secretary of the Treasury under the Trading With the Enemy Act (50 U. S. C. App. Sec. 5(b)(1)), to promulgate the Foreign Assets Control Regulation (31 C. F. R., Secs. 500.101 et seq.), for violation of which petitioners stand convicted.

2. The second question raises the issue as to whether the criminal sanctions of the Trading With the Enemy Act were properly applied to the petitioner Eugene Moy, and vicarious criminal liability imposed upon him in the absence of allegation in the indictment and competent proof on the trial that, as an officer, director or agent of the corporate petitioner, he personally knowingly participated in the violations of which he stands convicted. Here the Court below, in effect, applied in a felony case the principle of

vicarious criminal liability which this Court sustained in the case of *U. S.* v. *Dotterweich*, 320 U. S. 277, 64 Supreme Court 134, in a case involving a misdemeanor under the Federal Food, Drug and Cosmetic Act of 1938. We have been unable to find a case in this Court where such criminal sanctions were sustained under like circumstances in a felony prosecution.

3. The third question deals with the validity of the judgments of conviction against the petitioners Chin You Gon and Chin Hong Ming. As to these petitioners, it is contended that the Government failed to prove the essential allegation of "willfullness" beyond a reasonable doubt since the acts of said petitioners were as consistent with their innocence as with their guilt. As to this question, we submit that the Court below has decided the question in a way as to conflict with applicable decisions of this Court (Supreme Court Rule 19(1)(b)).

(d) *The statute and regulations involved.* The statute involved is the Trading With the Enemy Act (50 U. S. C. App., § 5(b)(1)(3)).

The regulation involved is the Foreign Assets Control Regulation, promulgated by the Secretary of the Treasury on December 17, 1950 (31 C. F. R., §§ 500.101 et seq.).

There are also involved the following Presidential proclamations:

Proclamation of National Emergency, No. 2914, proclaimed on December 16, 1950 (15 F. R. 9029, 64 Stat.).

Proclamation No. 2974 dated April 26, 1952, declaring termination of national emergencies proclaimed on December 8, 1939 and May 27, 1941 (17 F. R. 3813, 66 Stat. 31).

There are also involved the following Presidential Executive Orders:

No. 9193, dated July 6, 1942, as amended (7 F. R. 52025).
No. 9989, dated August 20, 1948 (13 F. R. 4891).
No. 10348, dated April 26, 1952 (17 F. R. 3769).

The pertinent texts of the foregoing are set forth in Appendix A (pp. 30-44) hereof.

(e) *Statement of the case.**

On April 28, 1952, the United States Attorney for the Southern District of New York filed in that Court an indictment which charged the petitioners with violating the Trading With the Enemy Act (Title 50, U. S. C. App., § 5(b), as amended) and orders, rules and regulations issued thereunder by the Secretary of the Treasury, allegedly pursuant to Executive Order No. 9193, to wit, Secs. 500.101 et seq., Chap. V, subtitle B, title 31, Code of Federal Regulations, known as the Foreign Assets Control Regulations. The regulations barred all financial transactions with nationals of mainland China after December 17, 1950 unless they were licensed or authorized by the Secretary of the Treasury (CDN 2a).

The Government charged in the indictment that petitioners knowingly and willfully engaged in transactions with, and for the benefit of nationals of the government which controls the China mainland, in violation of such regulations (CDN 4a-7a).

Jurisdiction of the District Court was founded on 18 U. S. C. § 3231.

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* There were three separate appendices filed below. Wherever pertinent, they will be designated in this petition as follows:

CDN—The appendix filed by the petitioners China Daily News, Inc. and Eugene Moy.
CYG—The appendix filed by the petitioners Chin You Gon and Chin Hong Ming.
Gov.—The appendix filed by the respondent United States of America.

The trial was had before District Judge Sylvester J. Ryan, without a jury. It was begun on June 7, 1954 and concluded on June 17, 1954 (CDN 11a-95a).

The petitioners rested on the Government's case and offered no witnesses in their own behalf (CDN 74a-75a).

The petitioner China Daily News, Inc. was found guilty on counts 1, 2, 4, 5 and 7 and was fined $5,000 on each of said counts, for a total fine of $25,000. Execution of the judgment entered upon such fine was stayed by Judge Ryan pending appeal.

The petitioner Eugene Moy was also found guilty on the same counts and was sentenced to two years' imprisonment on each of said counts, the sentences to run concurrently. He was admitted to bail by Judge Ryan in the sum of $2,500.

During the course of the trial (CDN 58a), on conviction (CDN 82a) and on sentence (CDN 95a), Judge Ryan recognized and stated that "a substantial question of law is involved".

The petitioner Chin You Gon was found guilty on counts 9 through 28 and count 30 and was sentenced to one year's imprisonment on each count, the terms to run concurrently.

The petitioner Chin Hong Ming was found guilty on counts 21 through 28 and count 30 and was sentenced to one year's imprisonment on each count, the terms to run concurrently.

The latter two petitioners were each admitted to bail in the sum of $1,000.

By order dated August 12, 1955, the Court of Appeals stayed the mandate and continued the individual petitioners in bail as theretofore fixed, pending the proceedings in this Court.

The record discloses the following:

The petitioner China Daily News Inc., a New York corporation, has published a Chinese language daily newspaper in New York City, known as the China Daily News, since about 1940. Its circulation extends beyond the United States.

At the dates alleged in the indictment, between January 11, 1951 and April 21, 1951, the petitioner Eugene Moy was the Chairman of the Board of Directors of the corporate petitioner as well as the managing editor and editor of its newspaper. Moy owned 25 shares of stock, out of a total issue of 764 shares distributed among over 300 stockholders. The corporation had a set of officers and a Board of Directors of more than 10 persons.

The petitioners Chin Hong Ming and Chin You Gon were laundry workers in a Bronx, N. Y. wet wash laundry. Each was an insignificant stockholder in the corporate petitioner and one was, for a time, a director.

The indictment specifically charged the corporate petitioner and Eugene Moy, not otherwise identified in the indictment, with financial transactions involving the extension of credit and the receipt of payments for certain advertisements published in the China Daily News at the instance of two Hong Kong banks, the Nan Yang Commercial Bank and the Bank of China, Overseas Service, Hong Kong. In substance, the advertisements indicated that these banks were available to receive remittances from overseas Chinese living in other countries for transmission to their relatives living in various provinces on the China mainland. The banks offered their services for these purposes (Gov. pp. 40a-42a, 50a-52a). Such advertisements had long been inserted in the China Daily News and other domestic Chinese language newspapers prior to December 17, 1950. The government itself offered proof that when representatives of the Treasury Department for the first time in August of 1951 questioned the right of the corporate petitioner to publish these advertisements, they were immedi-

ately withdrawn and the respective banks notified to that effect and advised to make no further remittances in payment (CDN 103a, 106a).

In counts 1, 2 and 4 of the indictment, the corporate petitioner and Moy were charged with receiving from the Nan Yang Bank and retaining the proceeds of checks aggregating $210 in payment for a number of advertisements previously published by the newspaper at $30 per month (CDN 4a-6a). Count 5 charged a transfer of credit on the corporate books of $90 to the same bank, for which no payment was received (CDN 6a), and in Count 7, the petitioners were charged with a transfer of credit of $30 to the Bank of China Overseas Service, Hong Kong (CDN 7a).

Substantially, the sole proof of the transactions pleaded in the indictment was documentary, consisting of the books, records, bank records and correspondence of the corporate petitioner, subpoenaed by the government, none of which directly connected the petitioner Moy with these transactions or with any financial transactions of the corporate petitioner (CDN 96a-106a). The files of the newspaper showed that the China Daily News, from time to time, published information in its news columns concerning the existence of the Foreign Assets Control Regulations (Gov. Ex. 101) and did publish a statement from one of its advertisers (not here involved) announcing that it would temporarily suspend accepting remittances by reason of the existence of the regulations (CDN 107a).

The petitioner Chin Hong Ming was charged with and found guilty of eight transactions, which consisted of sending, from time to time, moneys for the benefit and use of his family, consisting of a wife, two sons, a daughter and mother, all residing on the China mainland, on money orders procured for him by his friend Chin You Gon. For many years prior to the indictment, it had been his custom to send money to his nephew in China for distribution to the other members of his family in their native villages.

The petitioner Chin You Gon, was charged with and was found guilty of twenty-one transactions, which consisted in part of sending funds to his family in Toy Shan, China, consisting of his father, mother, five brothers and a niece in Canton. He had been supporting his family in this way for many years prior to December 17, 1950. The indictment included three counts for money orders which this petitioner had purchased for the petitioner Chin Hong Ming and another defendant, Tom Sung, since deceased, for transmission to the latter's family in Toy Shan and Canton. These two petitioners had been questioned by a representative of the Treasury Department prior to the indictment and had made full and complete disclosure of their remittances to their families. Unable to speak or understand English well, their statements were made in Chinese and were thereafter reduced to writing in affidavits prepared by the Treasury representatives in English, which affidavits these petitioners signed. At the same time, at the request of the Treasury men, these petitioners furnished to the latter the documentary proof of the remittances (CYG pp. 131a-138a). The indictments and judgments of conviction of these petitioners were based substantially on these affidavits. As to these petitioners, the record discloses that they furnished, in several instances, false names and addresses of payees when applying for the money orders used to make the remittances.

(f) *Argument amplifying the reasons relied on for the allowance of the writ.*

Introduction

The fundamental question which underlies the prosecution in this case is whether the newspaper China Daily News and its editor, Eugene Moy, petitioners here, have been convicted and punished because of their disagreement with the prevailing foreign policy of the administration

and whether the application of the statute here involved has been primarily to effectuate that purpose in violation of their rights under the First Amendment.

This becomes evident from the undisputed history of the prosecution undertaken by the Government and was reflected in the development of the trial and in the sentences imposed.

The Court below recognized that the sentences imposed by the District Judge "may well seem heavy," observing that the District Judge was "undoubtedly impressed with the claim of the prosecution that this was a planned and extensive siphoning of funds from New York City into Communist China, and that strict enforcement of the law was required in order to deter the Chinese community in general from further violations of the statute and regulations."

At the time the sentences were imposed, the advertisements had not been published for almost three years.

That the prosecution and the sentences were directed against the editorial policy of the newspaper is clear from the statement made by the United States Attorney in his plea for a heavy sentence. He said in part:

> "* * * that it appears from the editorials and from the so-called news articles that they were using all of their efforts against the efforts of this country during a time of national crisis" (Gov. p. 2a).

From the very beginning of the prosecution, the Government sought to surround this newspaper and its editor with unfounded charges of horrendous conduct.

Beginning on December 9, 1951, more than three months after the advertisements themselves had been removed from the newspaper, the Government, through its Treasury representative, Emmanuel E. Minskoff, who testified for the Government on the trial, held a press conference reported

in the New York Times on that date. The headline on the story reads: "Chinese Extortion Brings Death Here." The body of the story contains the following statement:

> "Mr. Minskoff said that an agency had stood ready in New York to expedite the Chinese reply to the money-extorting threats against relatives in China. This agency was The China Daily News, a Chinese language newspaper published at 105 Mott Street, Mr. Minskoff charged."

On Tuesday, April 29, 1952, the day after the indictment, the New York Times headlined its story: "Red Extortion Is Laid to City Chinese Daily." The first paragraph of the story reports that the defendants "were indicted yesterday by a Federal Grand jury as part of an 'international racket' involving murder, extortion and torture in which American Chinese have been mulcted of millions of dollars for Red China."

The former United States Attorney, Miles J. Lane, is quoted as commenting on the indictment in the following language:

> "Mr. Lane described the scheme as 'an international racket entailing murder, extortion, torture and, in general, commerce in human misery'."

The United States Attorney was quoted as referring to "a million dollar ransom paid," and then the article continues: "Most of the counts in the indictment relate to the 'extortion racket' in which American Chinese sent monies to relatives in mainland China."

It is within this frame of reference that one must view the Trial Judge's direction to the United States Attorney to inform him before sentence whether the newspaper and its Editor had acted as intermediaries for the transmission of money by other people of Chinese extraction and whether Moy "had participated in any extortionate practices" (CDN 82a). It is clear from this direction by the Trial

Court that the studied atmosphere intended to be created by the United States Attorney had made an impact. In reply to this inquiry, the United States Attorney reported (CDN 84a):

> "Your honor inquired whether there was any profit from these transactions received by the China Daily News or Eugene Moy, and I wish to advise your Honor that we have no information that any monetary profit was derived by the defendants China Daily News, Inc. or Eugene Moy.
>
> Your Honor also inquired whether or not China Daily News and Eugene Moy had any direct tie with any extortions that may have been involved in connection with the remittances by Chinese-Americans or American Chinese to mainland China. I wish to advise your Honor that we have no such information, that there is no direct connection between these defendants and such practices."

This should have removed from the case the horrendous atmosphere with which it had been burdened. Nevertheless, the United States Attorney, in his plea on sentence (Gov. 3a), having (on the Court's instance) acknowledged the baselessness of the Government's accusations of extortion, etc., sought the imposition of severe sentences, to punish the defendants not for these offenses, but for the political views of the newspaper. It is clear that he succeeded. Thus in effect, the petitioners have in reality been punished for their views—although the prosecution was based on five alleged technical violations.

ARGUMENT

I

As to question 1, there is presented a serious constitutional question concerning the delegation of Presidential powers, if the statute is construed and applied in the same manner sustained by the Court of Appeals below.

Section 5(b)(1) of the Trading with the Enemy Act provides that "during the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate" —among other things—prohibit transactions "involving any property in which any foreign country or a national thereof has any interest."

On September 8, 1939, the President proclaimed the existence of a national emergency in connection with and to the extent necessary for the proper observance, safeguarding, and enforcing of the neutrality of the United States and the strengthening of our national defense within the limits of peacetime authorizations (Proc. No. 2352, 4 F. R. 3851, 54 Stat. 2643).

On May 27, 1941, the President proclaimed the existence of an unlimited national emergency, requiring that the military, naval, air and civilian defenses of this country be put on a basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere (Proc. No. 2487, 6 F. R. 2617, 55 Stat. 1647).

On July 6, 1942, in connection with these declarations of national emergency and the declarations of war in December, 1941, the President delegated powers under § 5(b)(1) to the Secretary of the Treasury in Executive Order No. 9193 (Appendix A, p. 31, *infra*).

The Secretary of the Treasury purported to act under the authority granted by the President in that order, when he

promulgated the Foreign Assets Control Regulation on December 17, 1950, after the proclamation of a national emergency by the President on December 16, 1950 because of the Korean situation. The President gave the Secretary of the Treasury no specific directive to prohibit transactions with the China mainland, nor was there any reference thereto in the proclamation itself.

The Court below has held that since the emergencies under which Executive Order No. 9193 was issued, had not been terminated and the order itself remained unrevoked, the Secretary could, on his own initiative, without further directive of the President, impose restraints on transactions with a "foreign country" to wit, mainland China, as a result of events arising out of the new and different emergency—the Korean emergency.

This Court ought to consider and determine whether the President could constitutionally delegate to the Secretary of the Treasury by Executive Order No. 9193 his "full powers" under § 5(b)(1), "for such future need as might arise" in an emergency and under circumstances which were not in contemplation when the delegation was made, and also whether he did so.

The court below has in effect construed the language of § 5(b)(1), as sanctioning such a construction.

We respectfully submit that such a construction is unwarranted by the language of the section, which ties the President's power to delegate to specifically declared emergencies—i.e., declarations of war by the Congress and declarations of national emergencies by the President. To say that the Secretary of the Treasury, acting under a delegation granted in connection with an earlier national emergency may divine that the President desires him to use such authority in connection with a specific "foreign country" in a newly declared emergency, is to give the language used a meaning which would raise serious questions as to its

constitutionality, since it would authorize infringement on the constitutional powers of the President. It is no answer that the Secretary's act in no way conflicted with the wishes or intentions of the President. The fact is that neither the Constitution nor the statute authorize the Secretary of the Treasury to divine the "wishes or intentions of the President"—the President must express them in some legal form. There is nothing in the Proclamation of National Emergency (No. 2914), nor in any Presidential directive, by which the President authorized the Secretary to impose such drastic controls on a foreign country—China. We submit that only specific authority from the President could constitutionally warrant such action.

It is a general, well-established principle that:

> "The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties."

In foreign affairs, which include "foreign trade relations which come within its jurisdiction," management is confided by statute, to the Department of State (5 U. S. C. A. §§ 156, 157). The statutory delegation of certain general duties to the Secretary of the Treasury does not comprehend "any matters respecting foreign affairs" (see 5 U. S. C. A. § 242).

Thus, the Secretary of the Treasury can act in relation to "any matters respecting foreign affairs," only when the President has specifically and precisely designated the Secretary to act.

All the cases dealing with acts of delegation to and by the President, before, during and after World War II, are premised upon the President's making "findings" first, to justify imposing the legislative controls authorized to him, and then acting by Executive Order specifically delegating to an agency, which promulgated administrative regulations and proceeded to enforce them (cf. i.e., *Kiyoshi Hirabayashi*, 320 U. S. 81, 63 S. Ct. 1375; *O'Neal* v. *U. S.*,

140 F. (2) 908 (C. A. 6), cert. den. 322 U. S. 729, 64 S. Ct. 945).

The intention to exert the power must be plain, although meticulous precision of language is not necessary. (*U. S.* v. *Chemical Foundation,* 272 U. S. 1, 47 S. Ct. 1.)

Where the Executive exercises powers which are delegated to him by an enabling act, he must exercise the power so granted in substantial conformity with the conditions and requirements declared in the act. *Mahler* v. *Eby,* 264 U. S. 32, 44 S. Ct. 283; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 55 S. Ct. 241.)

In the *Chemical Foundation* case, this Court held that it was sufficient compliance with § 5(a) of the Act to issue an Executive order saying nothing more than—

> "I hereby vest in Frank L. Polk all power and authority conferred upon the President by the provisions of sections 12 * * *."

But the Court clearly indicated that *some Executive order of delegation was necessary to show the President's intention to exert the power conferred upon him in the given emergency upon which the terms of the statute became operative.*

We submit that it is stretching the language of the statute beyond the congressional intent to hold that any Executive Order, any delegation of power which was made within the framework of the prosecution of World War II or within the framework of the earlier national emergencies of 1939, 1940, 1941; can without further directive by the President be utilized in an entirely new factual situation which derived not from the earlier emergencies but derived and could only be derived from the national emergency declared on December 16, 1950.

This Court has decided that when there is a legislative declaration of an emergency, the continued applicability of the legislation must have relevance to the continuance of

that particular emergency within the framework of a particular set of facts.

In *Chastleton Corporation* v. *Sinclair,* 264 U. S. 543, 44 S. Ct. 405, Mr. Justice Holmes wrote as follows (at p. 547):

> "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. Perrin v. U. S., 232 U. S. 478, 486, 487, 34 S. Ct. 387; Missouri v. Chicago, Burlington & Quincy R. R. Co., 241 U. S. 533, 539, 540, 36 S. Ct. 715. * * * In our opinion it is open to inquire whether the exigency still existed upon which the continued operation of the law depended."

The language of § 5(b) itself, which defines the conditions upon which its provisions are to become operative, indicates that a new "war" or a new declared "emergency" requires the President by some affirmative act, to make a new delegation—or to extend the existing delegation to the new emergency. The statute rationally fixes a sequence. First there must be declared to exist one of the defined emergencies. Only then may the President delegate his power to deal with that particular emergency. Since the issue is one of prime importance in connection with the whole problem of the delegation of executive power, we submit that it requires the consideration of this Court.

II

The second question involves the imposition of vicarious criminal liability in a felony case.

The premise of the decisions below is that "each of the defendants engaged in financial transactions involving interests in Communist China" (Opinion infra, p. 26). As to the petitioner Moy, the decision is based upon the finding that he was an officer, agent and director of the petitioner China Daily News, Inc. and thus charged with its corporate acts. Thus the Court below says:

> "The first two, the China Daily News, Inc., *and its editor, Eugene Moy,* extended credit and received payments in the New York newspaper, China Daily News, by Communist controlled banks in Hong Kong" (Opinion infra, p. 26). (Emphasis supplied.)

In order to reach this conclusion, the Court held that the books of the corporation "were admissible as against Moy as Editor, Managing Editor and Chairman of the Board of Directors of the newspaper" (Opinion infra, p. 29), although there was nothing in the records which connected Moy in any way with any of these transactions. The indictment charged Moy with being an actor, which he was not. The Court below held that "the indictment adequately gave notice of the crime charged" (Opinion infra, p. 29). The fact is that the petitioner Moy was charged in the indictment with the acts of "extending credit" and "receiving payment", but there was no charge that he participated as an officer, agent or director of the corporation.

Insofar as it applies to officers, directors or agents of a corporation, the statute requires, in addition to willfulness, that two additional elements must be charged and proved: (a) knowledge; and (b) participation. Petitioner Moy was never charged with this crime. Yet the opinion of the Court is based upon the assumption that he was.

As far as the element of knowledge is concerned, the Court is likewise in error. The opinion states that:

> "Personal knowledge of the violation of the regulations was brought home to Moy by a conversation with one Chang."

The record indicates that the conversation between Moy and Chang had nothing to do with the transactions for which Moy was convicted. All it shows is that Eugene Moy had been apprised by Chang that there was a freezing regulation (CDN 31a-39a). To infer from his knowledge of the existence of the freezing that Moy participated in

criminal transactions is erroneous because a finding of criminality cannot reasonably be based upon such an inference, especially since the finding is at variance with the crime charged.

This Court ought to consider whether the criminal sanctions of the Trading With the Enemy Act, § 5(b)(3) have been properly imposed upon the petitioner Eugene Moy, who stands convicted wholly by virtue of his capacity as Chairman of the Board of Directors of the corporate petitioner and as managing editor and editor of its newspaper, the China Daily News.

The petitioner Moy was charged with violating § 5(b)(3) of the Trading with the Enemy Act and the Foreign Assets Control Regulation, purportedly promulgated under authority allegedly flowing from that source. This regulation prohibits any transaction involving any payment to or from a national of the China mainland or a transfer of credit to such a national.

There is no evidence in this case of any personal guilt on the part of the petitioner Moy. There is no proof that he ever personally knew of the transactions which form the basis of the counts in the indictment. There is no evidence at all that he actively participated in these transactions. Vicarious guilt is imputed to the petitioner solely on the basis of his position and responsibility as Chairman of the Board of Directors of the corporate petitioner, as managing editor and editor of its newspaper. It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who, like the petitioner Moy, a newspaper editor, had no evil intention or consciousness of wrongdoing.

In the absence of clear statutory authorization, it is inconsistent with the established canons of criminal law to rest liability on an act in which the accused did not participate, and of which he had no personal knowledge.

Before the stigma of criminal conviction is placed upon any such citizen, the legislative mandate must be clear and unambiguous and the proof must be substantial, clear and convincing beyond a reasonable doubt.

That which Chief Justice Marshall has called "the tenderness of the law for the rights of individuals" (*U. S.* v. *Wiltberger,* 5 Wheat. 76, 5 L. Ed. 37) entitles each person, regardless of economic, political or social status, to an unequivocal warning from the Legislature as to whether he is in the class of persons subject to vicarious liability.

In the instant case, the legislative mandate is clear that the Courts did not intend to punish anyone who is not "plainly and unmistakably" within the confines of the statute (*U. S.* v. *Lacher,* 134 U. S. 624, 628, 10 S. Ct. 625, 626; *U. S.* v. *Gradwell,* 243 U. S. 476, 485, 37 S. Ct. 407)—that is, it did not intend to impose upon the corporate officer or director a vicarious liability. The penal provisions of the statute prescribe:

> "Any officer, director or agent or any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment or both."

Thus, by the language used, the Congress specifically excluded "vicarious" liability and subjected corporate officers to criminal sanctions only when "they knowingly participated" personally in the acts prescribed by the statute.

The legislative differentiation reveals the congressional intent to impose liability on corporations without restriction but to limit liability of corporate officers to those who "knowingly participated." In *U. S.* v. *Dotterweich,* 320 U. S. 227, 64 S. Ct. 134, this Court held that it was not necessary in a prosecution for a misdeamenor under the Federal Food, Drug and Cosmetic Act of 1938 to prove either personal participation, guilty knowledge or wrongful intent to hold the officers of a corporation liable for the acts of the corporation. Later in the *Carolene Products* case, 323 U. S. 18, this Court also affirmed a conviction of

corporate officers under the Filled Milk Act of 1923, although the limited ground of certiorari did not present for consideration the personal and individual liability of the corporate officers. The Court of Appeals in the *Carolene Products* case had relied on this Court's decision in *Dotterweich* to sustain the vicarious liability of the corporate officers (140 F. 2d 61, 66). But these were both "misdemeanor" cases and not "felony" cases where personal guilt must be charged and proved, especially where the statute itself (§ 5(b)(3)) interdicts only "knowing participation" by a corporate officer.

The case against the petitioner Moy rests entirely on the facts of his relationship to the corporation, from which the inferences and implications of criminal liability have been erroneously drawn.

In essence, the conviction is premised upon the fact that the petitioner Moy was the editor of the newspaper and should have known that the advertisements were being published and as a result should have known that the newspaper was being paid, or was extending credit for these advertisements. This is a rather serious imposition of vicarious criminal liability upon the editor of a newspaper. We, therefore, submit that this Court ought to examine whether there is any justification for extending the principle of vicarious criminal liability to jeopardize the freedom of a newspaper editor and thereby restrict the protection accorded to the press under the First Amendment.

III

This Court has, from time to time, indicated the quality of proof necessary to establish "willfulness" in a criminal case. A willful act has been described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, heedlessly or inadvertently. This Court in the case of *United*

States v. *Murdock*, 290 U. S. 389, 394, defined the word "willful" in a criminal case as follows:

> "• • • The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute, it generally means an act done with a bad purpose • • • without justifiable excuse • • •; stubbornly, obstinately, perversely • • •."

There must be a measure of deliberateness to violate the law. The *Murdock* case involved a prosecution under the Revenue Act of 1926. The Court, commenting upon the nature of such an act said at page 395:

> "• • • where directions as to the method of conducting a business are embodied in a revenue act to prevent loss of taxes, and the act declares a willful failure to observe the directions a penal offense, an evil motive is a constituent element of the crime."

Likewise, in the case of *Felton* v. *United States*, 96 U. S. 699, 702, 24 L. Ed. 875, it was said:

> "Doing or omitting to do a thing knowingly and willfully implies not only a knowledge of the thing, but a determination with a bad intent to do it, or omit doing it."

The word "willfully," says Chief Justice Shaw, "in the ordinary sense in which it is used in statutes means not merely 'voluntarily,' but with a bad purpose." *Com.* v. *Kneeland*, 20 Pick. 220. "It is frequently understood," says Bishop, "as signifying an evil intent without justifiable excuse." 1 Bish. Cr. Law, § 428. Cf. *Spurr* v. *United States*, 174 U. S. 728, 19 S. Ct. 812, and *Potter* v. *United States*, 155 U. S. 438, 15 S. Ct. 144, 147, 39 L. Ed. 214. Cf. *Screws* v. *U. S.*, 325 U. S. 91, 102, 65 S. Ct. 1031, 1035.

We submit that the Court below, in sustaining the convictions of the petitioners Chin You Gon and Chin Hong Ming, decided this question of willfulness in such a way as to conflict with the foregoing decisions of this Court.

The proof adduced against these petitioners consisted, in the main, of checks and money orders purchased by them and sent to their relatives on the China mainland over a period of many months; summaries of statements made by the defendants to Treasury officials and testimony of these officials concerning the circumstances under which the summaries were prepared. Although each summary in affidavit form was couched in the legal English of the Treasury agents and purported to contain everything said to have been uttered by the defendants, none of the summaries asserts that the petitioners had a conscious awareness of regulations or laws which were violated by their acts. Each of these summaries contained clear statements of every salient fact, save one, mention of the very regulations which the affiants were accused of violating—willfully. This significant omission is important because the element of willfulness and knowledge had to be proved by the Government, beyond a reasonable doubt, in order to sustain a finding of guilt in this case.

Chin Hong Ming stated that he had asked his friend, Chin You Gon, to get the checks for him because he did not have time to do so. The checks were made out to Ming's nephew, Chin Hong Yet or to Ming himself as payee. In the summary affidavit signed and sworn to by this defendant there is not the slightest reference to laws or regulations, or even apparent awareness of any irregularity. The Government witness, Miss Helena Kuo, who was present when Mr. Ming was interrogated by the Treasury officials at the laundry and who translated the questions and answers, could not recall any question put to Ming which referred to law violations or regulations forbidding transfers of money to the China Mainland (CYG 44a). Hence, as to Chin Hong Ming, there has been a complete absence of proof of knowledge of the regulation and no proof whatsoever of willfulness.

The testimony concerning Chin You Gon given by Alfred Wong, the Chinese interpreter, shows that although this witness was present to translate to and from Gon, at no time during the interrogation of Gon did he hear Gon indicate that he understood what the Foreign Assets Control Regulations were (CYG, p. 61a). The witness Minskoff, who was in charge of interrogating Gon, attempted to prove that the defendant knew it was illegal to send money to China, but admitted that Chin You Gon had said that he (Gon) did not know it was illegal (CYG, p. 65a).

The witness Minskoff then attempted to show that the defendant Gon had actually admitted knowledge that it was illegal to send money to China, when the Court asked him how he had interrogated Gon on this subject. His answer showed that Minskoff had drawn a conclusion himself that Gon knew about the law from the fact that Gon had said that banks refused to sell him checks which were to go to China. The witness admitted that he had drawn a conclusion that Gon knew about the law and had deliberately violated it (CYG, p. 66a).

Since the undisputed evidence showed that the petitioners actually had families in China whom they had supported in China for many years and it was to these natural objects of their bounty and to them alone, that they sent part of their earnings and savings, these undisputed facts cannot be the basis of a finding of guilt where the evidence is susceptible of two inferences, one of which is in favor of innocence. The circumstances relied on are thus robbed of all probative value even though the inference of guilt may be fairly deducible. The effect of the existence of the two inferences, one of which is in favor of innocence, is to destroy the element of willfulness which the Government was required to establish in order to sustain these convictions.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL L. ROSS,
MARTIN POPPER,
Counsel for Petitioners
China Daily News and Eugene Moy.

THOMAS RUSSELL JONES,
Counsel for Petitioners
Chin You Gon and Chin Hong Ming.

Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 331—October Term, 1954.

Argued June 14, 1955 Decided July 5, 1955

Docket No. 23231

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

CHINA DAILY NEWS, INC., and
EUGENE MOY,
Defendants-Appellants,
and

CHIN YOU GON, TOM SUNG, and
CHIN HONG MING,
Defendants-Appellants.

Before CLARK, Chief Judge, and MEDINA and HINCKS, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Sylvester J. Ryan, Judge.

Defendants China Daily News, Inc., Eugene Moy, Chin You Gon, Tom Sung, and Chin Hong Ming appeal from their convictions for violations of the Trading With the Enmey Act, 50 U. S. C. App. Sec. 5 (b) and Treasury Regulations enacted pursuant thereto. Affirmed.

William Esbitt, Asst. U. S. Atty. for the Southern Dist. of New York, New York City (J. Edward Lumbard, U. S. Atty., New York City, on the brief), for plaintiff-appellee.

Paul L. Ross, of Wolf, Popper, Ross, Wolf & Jones, New York City, for defendants-appellants China Daily News, Inc., and Eugene Moy.

Thomas Russell Jones, Brooklyn, N. Y., for defendants-appellants Chin You Gon, Tom Sung, and Chin Hong Ming.

CLARK, Chief Judge.

These are appeals from judgments of conviction entered against several defendants under the Trading With the Enemy Act and regulations enacted pursuant thereto. Each of the defendants engaged in financial transactions involving interests in Communist China. The first two, the China Daily News, Inc., and its editor, Eugene Moy, extended credit and received payment for certain advertisements in the New York newspaper, China Daily News, by Communist controlled banks in Hong Kong. The other defendants (stockholder or stockholders and directors of the News) sent checks to relatives and acquaintances on the China mainland for the individual benefit of the recipients. Since the fact that these transactions occurred is not disputed, the appeal turns on the criminal consequences of such acts under the regulations. The defendants question both the applicability and the validity of the regulations, and in addition they raise other points concerning the admissibility and sufficiency of the evidence and the adequacy of the indictment. We are urged to give particularly serious consideration to these asserted errors because of the allegedly stringent sentences imposed by the trial judge. The case was heard by Judge Ryan without a jury after waiver of jury trial by all defendants. Section 5(b)(1) of the Trading With the Enemy Act, 50 U. S. C. App. Sec.

5(b)(1), gives the President or his appointee the power to control financial transactions with foreign countries in times of war or during other periods of national emergency. On July 6, 1942, after declarations of national emergency in 1939 and 1941, and declarations of war in 1941, the President delegated his power under this statute to the Secretary of the Treasury in Exec. Order No. 9193. That executive order, unrepealed to date, was the basis for the promulgation of the current Foreign Assets Control Regulations, 31 CFR Secs. 500.101 et seq., on December 17, 1950, after the proclamation of a national emergency because of the Korean War. These regulations purport to cover all financial dealings with or for the benefit of Communist China or a national thereof.

Defendants China Daily News and Eugene Moy argue that their challenged dealings with the Bank of China and the Nanyang Commercial Bank in Hong Kong were licensed under former Sec. 500.512 of the Foreign Assets Control Regulations. A careful reading of subsection (c), which is particularly relied upon, discloses no intent to authorize transactions with Hong Kong banks by anyone outside Hong Kong, such as these defendants. Furthermore, provisos to subsection (c) specifically exclude transactions by or on behalf of a specially designated national or a designated national not within the authorized trade territory. Since the banks in question were Communist controlled and were soliciting funds for Communist China, the extension of credit to them and the receipt of payments from them were undoubtedly prohibited by the provisos. See Secs. 500.305, 500.306. The other defendants do not question the applicability of the regulations to them.

A more serious attack is directed to the Secretary of the Treasury's power to enact these regulations. Defendants maintain that the earlier delegation of power to the Secretary in 1942 was limited to the World War II situation and could not cover a new Korean emergency without a special reappointment by the President. Although the delegation

of power in Exec. Order No. 9193 was never so limited, there perhaps might be some substance to defendants' argument if the power of the Secretary had ever lapsed through the termination of all states of war and emergencies. Conceivably such a result might follow from the fact that the President himself is empowered to act only in emergency situations. We need not reach that question here, however, since at the time of the declaration of the Korean emergency and the promulgation of these regulations, the World War II emergency had not yet been declared terminated. This latter event did not occur until April 26, 1952, and was accompanied by a reassertion of the Korean emergency and preservation of the executive orders delegating authority pursuant thereto. Exec. Order No. 10348. Thus at all relevant times the Secretary was empowered to act under Sec. 5(b) of the Trading with the Enemy Act. There has been no suggestion that his exercise of that power in any way exceeded the scope of the statute or conflicted with the wishes or intentions of the President.

Once the validity and applicability of the regulations are established, the only other question of importance is whether or not the evidence sufficiently established the defendants' willful and knowing violation thereof. Our examination of the record convinces us that the convictions must stand. In support of this conclusion we need point only to some of the more significant items in the evidence. All of the individual defendants were affiliated with the China Daily News, itself a defendant, which published news reports and notices about the fact of federal blocking of financial dealings with Communist China and also suggestions for circumventing the regulations. Personal knowledge of violation of the regulations was brought home to Moy by a conversation with Chang, and could be deduced, in the case of the other individual defendants, from their use of fictitious payees and addresses when sending money to China. Each of the defendants repeatedly ignored the regulations so that their violations could be reasonably characterized as willful.

Defendant Moy complains of the admissibility of certain evidence against him, and he and the China Daily News contend that the indictment under which they were convicted was fatally defective. The evidence with which Moy is concerned consisted of the books of the China Daily News which detailed the financial transactions of which it and he were convicted. These books were admissible against Moy as Editor, Managing Editor, and Chairman of the Board of Directors of the newspaper, *United States* v. *Feinberg*, 2 Cir., 140 F. 2d 592, 154 A. L. R. 272, certiorari denied *Feinberg* v. *United States*, 322 U. S. 726; in addition there was sufficient other evidence to support conviction without them. The indictment adequately gave notice of the crime charged, and was not defective in failing to list exempted transactions within which the dealings of the defendants did not in any case fall.

We come lastly to the sentences imposed by Judge Ryan. These included a total fine of $25,000 for the China Daily News on the several counts, and prison sentences for all the individual defendants, amounting to two years for Moy and one year for the others, with sentence suspended as to one, Tom Sung. This of course is much less than could have been imposed even on a single count, the statute permitting a fine up to $10,000 or imprisonment up to ten years or both. Nevertheless, considering the small amounts involved, the sentences may well seem heavy. Judge Ryan, was, however, undoubtedly impressed with the claim of the prosecution that this was a planned and extensive siphoning of funds from New York City into Communist China, and that strict enforcement of the law was required in order to deter the Chinese community in general from further violations of the statute and regulations. Be that as it may, the matter was one for Judge Ryan's discretion which we are not authorized to review.

We are informed by counsel on both sides that Tom Sung has died subsequent to his conviction and during the pendency of his appeal. His appeal is therefore dismissed as moot. The convictions against the remaining defendants are affirmed.

APPENDIX A TO PETITION FOR WRIT OF CERTIORARI

Statute, Executive Orders, Presidential Proclamations, and Regulations Involved

The Statute

The statute involved is The Trading With the Enemy Act, 50 U. S. C., Appendix Sec. 5(b) as amended. So far as pertinent, it provides:

> "Sec. 5 * * * (b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise——
>
> (a) investigate, regulate or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions, involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may per-

form any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(3) * * * *Whoever wilfully violates any of the provisions of this subdivision or any license, order, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.* As used in this subdivision the term 'person' means an individual, partnership, association, or corporation."

Presidential Executive Orders

Executive Order No. 9193, July 6, 1942 (7 F. R. 52025) as amended, so far as pertinent, provides:

"3. Subject to the provision of this Executive Order, all powers and authority conferred upon me by sections 3 (a) and 5 (b) of the Trading with the enemy Act, as amended, are hereby delegated to the Secretary of the Treasury or any person, agency, or instrumentality designated by him; *provided, however,* That when

any property or interest, not belonging to a foreign government or central bank, shall be vested by the Secretary of the Treasury, such property or interest shall be vested in, and dealt with by the Alien Property Custodian upon the terms directed by the Secretary of the Treasury. Except as otherwise provided herein, this Executive Order shall not be deemed to modify or amend Executive Order No. 8389, as amended, or the President's Proclaimation of July 17, 1941, or Executive Order No. 8839, as amended, or the regulations, rulings, licenses and other action taken thereunder, or in connection therewith.

* * * * * *

"12. Any orders, regulations, rulings, instructions, licenses or other actions issued or taken by any person, agency or instrumentality referred to in this Executive Order, shall be final and conclusive as to the power of such person, agency or instrumentality to exercise any of the power or authority conferred upon me by sections 3 (a) and 5 (b) of the Trading with the enemy Act, as amended; and to the extent necessary and appropriate to enable them to perform their duties and functions hereunder, the Secretary of the Treasury and the Alien Property Custodian shall be deemed to be authorized to exercise severally any and all authority, rights, privileges and powers conferred on the President by sections 3 (a) and 5 (b) of the Trading with the enemy Act of October 6, 1917, as amended, and by sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941. No person affected by any order, regulation, ruling, instruction, license or other action issued or taken by either the Secretary of the Treasury or the Alien Property Custodian shall be entitled to challenge the validity thereof or otherwise excuse his actions, or failure to act, on the ground that pursuant to the provisions of this Executive Order, such order, regulation, ruling, instruction, license or other action was within the jurisdiction of the Alien Property Custodian rather than the Secretary of the Treasury or vice versa."

Executive Order No. 9989 (13 F. R. 4891), so far as pertinent, provides:

> "3. It is the policy of this order that administrative action under paragraph 1 hereof shall be taken by the Attorney General or any officer, person, agency, or instrumentality designated by him. However, nothing in this order shall be deemed to limit or remove any powers heretofore conferred upon the Secretary of the Treasury or the Attorney General by statute or by Executive order. No person affected by any order, regulation, ruling, instruction, license or other action issued or taken by either the Secretary of the Treasury or the Attorney General may challenge the validity thereof or otherwise excuse his actions, or failure to act, on the ground that pursuant to the provisions of this Executive order, such order, regulation, ruling, instruction, license, or other action was within the jurisdiction of the Attorney General rather than the Secretary of the Treasury or *vice versa*."

Executive Order 10348 (17 F. R. 3769)

Executive Order No. 8389 of April 10, 1940, as amended, and Executive Order No. 9989 of August 20, 1948, and all delegations, designations, regulations, rulings, instructions, and licenses issued under such orders are hereby continued in force according to their terms for the duration of the period of the national emergency proclaimed by Proclamation No. 2914 of December 16, 1950.

The Whitehouse
April 26, 1952

HARRY S. TRUMAN.

Proclamation No. 2914

December 16, 1950 (15 F. R. 9029)

Whereas recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil

the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

Whereas world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

Whereas, if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to choose those who conduct their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

Whereas, the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

Now, therefore, I, Harry S. Truman, President of the United States of America, do proclaim the existence of a national emergency, which requires that the military, naval, air, and civilian defenses of this country be strengthened, as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace.

I summon all citizens to make a United Effort for the security and well-being of our beloved country and to place its needs foremost in thought and action that the full moral and material strength of the Nation may be readied for the dangers which threaten us.

I summon our farmers, our workers in industry, and our businessmen to make a mighty production effort to meet

the defense requirements of the Nation and to this end to eliminate all waste and inefficiency and to subordinate all lesser interests to the common good.

I summon every person and every community to make, with a spirit of neighborliness, whatever sacrifices are necessary for the welfare of the Nation.

I summon all State and local leaders and officials to cooperate fully with the military and civilian defense agencies of the United States in the national defense program.

I summon all citizens to be loyal to the principles upon which our Nation is founded, to keep faith with our friends and allies, and to be firm in our devotion to the peaceful purposes for which the United Nations was founded.

I am confident that we will meet the dangers that confront us with courage and determination, strong in the faith that we can thereby "secure the Blessings of Liberty to ourselves and our Posterity."

Proclamation No. 2974

Termination of the Nataional Emergencies Proclaimed on September 8, 1939, and May 27, 1941

WHEREAS by Proclamation No. 2352 of September 8, 1939, the President proclaimed the existence of a national emergency in connection with and to the extent necessary for the proper observance, safeguarding, and enforcing of the neutrality of the United States of America and the strengthening of our national defense within the limits of peacetime authorizations; and

WHEREAS by Proclamation No. 2487 of May 27, 1941, the President proclaimed the existence of an unlimited national emergency, requiring that the military, naval, air, and civilian defenses of this country be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere; and

WHEREAS acts of aggression against the United States of America by Axis Powers subsequently led to declarations by the Congress of the existence of states of war between the United States of America and Japan, Germany, Italy, Hungary, Rumania and Bulgaria; and

WHEREAS the state of war between the United States of America and Japan, which was the last of the aforesaid states of war still existing, was terminated by the coming into force this day of the Treaty of Peace with Japan signed at San Francisco on September 8, 1951:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim that the national emergencies declared to exist by the proclamations of September 8, 1939, and May 27, 1941, terminated this day upon the entry into force of the Treaty of Peace with Japan.

Nothing in this proclamation shall be construed to affect Proclamation No. 2914, issued by the President on December 16, 1950, declaring that world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world, and proclaiming the existence of a national emergency requiring that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace; and nothing herein shall be construed to affect the continuation of the said emergency of September 8, 1939, as specified in the Emergency Powers Interim Continuation Act, approved April 14, 1952 (Public Law 313—82nd Congress), for the purpose of continuing the use of property held under the Act of October 14, 1940, ch. 862, 54 Stat. 1125, as amended.

IN WITNESS WHEREOF, * * *.

HARRY S. TRUMAN.

Regulations of the Secretary of the Treasury

The Foreign Assets Control Regulations (Title 31, Code of Federal Regulations—Chap. V, Part 500), so far as pertinent, provide:

"§ 500.201 *Transactions involving designated foreign countries or their nationals; effective date.* (a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of any designated foreign country, or any national thereof, or such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;

(2) All transactions in foreign exchange by any person within the United States; and

(3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or the earmarking of any such property, by any person within the United States.

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person, subject to the jurisdiction of the United States; and

All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraphs (a) or (b) of this section is hereby prohibited.

(d) The term 'designated foreign country' means a foreign country in the following schedule and the term 'effective date' and the term 'effective date of this section' means with respect to any designated foreign country, or any national thereof, 12:01 a. m., eastern standard time, of the date specified in the following schedule:

SCHEDULE

Country and Effective Date

1. China: December 17, 1950.

2. North Korea, i. e., Korea north of the 38th parallel of North Latitude: December 17, 1950.

With respect to any country and for any other purpose for which an 'effective date' is not otherwise provided the 'effective date' shall be December 17, 1950.

* * * * * *

§ 500.301 *Foreign country.* The term "foreign country" also includes but not by way of limitation:

(a) The state and the government of any such territory on or after the "effective date" as well as any political subdivision, agency, or instrumentality thereof or any territory, dependency, colony, protectorate, mandate, dominion, possession or place subject to the jurisdiction thereof,

(b) Any other government (including any political subdivision, agency, or instrumentality thereof) to the extent and only to the extent that such government

exercises or claims to exercise control, authority, jurisdiction or sovereignty over territory which on the "effective date" constituted such foreign country,

(c) Any person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, since the "effective date," acting or purporting to act directly or indirectly for the benefit or on behalf of any of the foregoing and

(d) Any territory which on or since the "effective date" is controlled or occupied by the military, naval or police forces or other authority of such foreign country.

§ 500.302 *National.* (a) The term "national" shall include:

(1) A subject or citizen of, or any person who has been within, a foreign country, whether domiciled or resident therein or otherwise, at any time on or since the "effective date."

(2) Any partnership, association, corporation, or other organization, organized under the laws of, or which on or since the "effective date" had or has had its principal place of business in a foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, a foreign country and/or one or more nationals thereof as defined in this section.

(3) Any person to the extent that such person is, or has been, since the "effective date" acting or purporting to act directly or indirectly for the benefit or on behalf of any national of a foreign country.

(4) Any other person who there is reasonable cause to believe is a "national" as defined in this section.

(b) The Secretary of the Treasury retains full power to determine that any person is or shall be deemed to be a "national" within the meaning of this

section, and to specify the foreign country of which such person is or shall be deemed to be a national.

* * * * * * *

§ 500.305. *Designated national.* The term "designated national" shall mean any country designated in § 500.-201 and any national thereof including any person who is a specially designated national.

* * * * * * *

§ 500.309 *Transactions.* The phrase "transactions which involve property in which any designated foreign country, or any national thereof, has any interest of any nature whatsoever, direct or indirect," includes, but not by way of limitation (a) any payment or transfer to any such designated foreign country or national thereof, (b) any export or withdrawal from the United States to such designated foreign country, and (c) any transfer of credit, or payment of an obligation, expressed in terms of the currency of such designated foreign country.

§500.310 *Transfer.* The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power.

§ 500.311 *Property; property interests.* Except as defined in § 500.203 (f) for the purposes of that section the terms "property" and "property interest" or "property interests" shall include, but not by way of limitation, money, checks, drafts, bullion, bank deposits, savings accounts, any debts, indebtedness obligations, notes, debentures, stocks, bonds, coupons, any other financial securities, bankers' acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendor's sales agreements, land contracts, real estate and any interest therein, leaseholds, ground rents, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks, copyrights, contracts or licenses affecting or involving patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent.

§ 500.312 *Interest.* The term "interest" when used with respect to property shall mean an interest of any nature whatsoever, direct or indirect.

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§ 500.322 *Authorized trade territory; member of the authorized trade territory.* (a) the term "authorized trade territory" shall include:

(1) North, South, and Central America, including the Caribbean region;

(2) Africa;

(3) Oceania, including Indonesia and the Philippines;

(4) Andorra, Austria, Belgium, Denmark, Eire, the Federal Republic of Germany and the Western sectors of Berlin. Finland, France (including Monaco), Greece, Iceland, Italy, Lichtenstein, Luxembourg, the

Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, the United Kingdom and Yugoslavia;

(5) Afghanistan, Bhutan, British Malaya, Burma, Ceylon, Formosa, the French Establishments in India, *Hong Kong,* India, Indo-China, Iran, Iraq, Israel, Japan, Kuwait, Lebanon, Macao, Nepal, Oman, Pakistan, Portuguese India, Saudi Arabia, South Korea, Syria, Thailand, Trans-Jordan, and Yemen;

(6) Any colony, territory, possession, or protectorate of any country included within this paragraph; but the terms shall not include the United States.

(b) The term "member of the authorized trade territory" shall mean any of the foreign countries or political subdivisions comprising the authorized trade territory.

* * * * * * *

§ 500.512 *Transactions incident to trade with members of the authorized trade territory.* (a) All transactions ordinarily incident to the importing and exporting of goods, wares and merchandise between the United States and any of the members of the authorized trade territory or between the members of the authorized trade territory are hereby authorized provided the following terms and conditions are complied with:

(1) Such transaction shall not be by, or on behalf of, or pursuant to the direction of any designated national not within the authorized trade territory;

(2) Such transaction shall not involve property in which any designated national not within the authorized trade territory, has at any time on or since the "effective date" had any interest; and

(3) Any banking institution within the United States, prior to issuing, confirming or advising letters of credit, or accepting or paying drafts drawn, or reimbursing themselves for payments made under letters of credit, or making any other payment or transfer of credit, in connection with any importation or exportation pursuant to this section, or engaging in any other transaction herein authorized, shall satisfy itself

(from the shipping documents or otherwise) that: (i) Any such transaction is incident to a bona fide importation or exportation and is customary in the normal course of business, and that the value of such importation or exportation reasonably corresponds with the sums of money involved in financing such transactions; and (ii) such importation or exportation is or will be made pursuant to all the terms and conditions of this section.

(b) Subject to all other terms and conditions of this section any national of a designated foreign country doing business within the United States pursuant to a license is also hereby authorized, while so licensed, to engage in any transaction referred to in paragraph (a) of this section to the same extent that such national is licensed to engage in such transaction involving persons within the authorized trade territory who are not nationals of a designated foreign country.

(c) Any transaction engaged in by a bank within the authorized trade territory pursuant to the order of or for the account of any national of a designated foreign country within the authorized trade territory is also hereby authorized, upon the terms and conditions prescribed in paragraph (a) (1) and (2) of this section to the same extent, and under the same circumstances, as though such transaction were solely for the account of such bank; *Provided,* That this paragraph does not authorize:

(1) Any payment, transfer or withdrawal from any blocked account,

(2) Any transaction by or on behalf of or pursuant to the direction of a specially designated national or a designated national not within the authorized trade territory, or,

(3) Any transaction which involves any property in which on or since the "effective date" any specially designated national or any designated national not within the authorized trade territory has had an interest.

(d) This section does not authorize any transaction with a partnership, association, corporation or other organization within the authorized trade territory

which is organized under the laws of, or which on or since the "effective date" had or has had its principal place of business in a designated foreign country or which on or since such "effective date" was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such designated foreign country or one or more nationals thereof not within the authorized trade territory.

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§ 500.701 *Penalties.* (a) Attention is directed to section 5 (b) of the Trading With the Enemy Act, as amended, which provides in part:

Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000 or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

This section of the Trading With the Enemy Act, as amended, is applicable to violations of any provision of this chapter and to violations of the provisions of any license, ruling, regulation, order, direction or instruction issued by or pursuant to the direction or authorization of the Secretary of the Treasury pursuant to this chapter or otherwise under section 5 (b) of the Trading With the Enemy Act, as amended.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 372

CHINA DAILY NEWS, INC., EUGENE MOY, CHIN YOU GON AND CHIN HONG MING, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 25-29)[1] has not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 5, 1955 (Pet. App. 25). A timely petition for rehearing was denied on August 3, 1955. The petition

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[1] As in the petition, the appendix filed below by the China Daily News, Inc. and Eugene Moy will be referred to as "CDN", the appendix filed by Chin You Gon and Chin Hong Ming as "CYG", and the appendix filed by the United States as "Gov." The designation "App." will be used to refer to the Government's appendix to this brief; "Pet. App." denotes the appendix to the petition for certiorari.

for a writ of certiorari was filed September 2, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a valid delegation of authority under the Trading with the Enemy Act by the President to the Secretary of the Treasury to issue the Foreign Assets Control Regulations.

2. Whether there was sufficient evidence to prove petitioner Eugene Moy's knowing participation in the violation of the Trading with the Enemy Act and the Foreign Assets Control Regulations issued thereunder.

3. Whether there was sufficient evidence to prove wilful violation by petitioners Chin You Gon and Chin Hong Min of the Act and the Regulations.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)) and the Foreign Assets Control Regulations issued thereunder are set forth in the petitioners' brief (Pet. App. 30-11, 37 *et seq.*). These regulaions were issued pursuant to Executive Order 9193 (Chapter V, Subtitle B, Title 31, Code of Federal Regulations) (App. 18-19).

STATEMENT

Petitioners China Daily News, Inc., Eugene Moy, Chin You Gon, and Chin Hong Ming, seek review of judgments of conviction and sentence entered in the United States District Court for the Southern District of New York on June 17, 1954 (CDN 8a-10a; CYG 13a-15a), after a trial without a jury (CDN 11a; CYG 18a-21a). China Daily News, Inc. was fined $5,000 on each of the five counts on which it was convicted (CDN 8a-

9a); Eugene Moy was sentenced to two years' imprisonment on each of the same five counts, to run concurrently (CDN 9a-10a). Chin You Gon was found guilty on 21 other counts and sentenced to one year on each count, to run concurrently (CYG 13a-14a). Chin Hon Ming was found guilty on 11 counts and was also sentenced to one year on each count, to run concurrently (CYG 14a-15a). The judgments were affirmed on appeal.

On April 28, 1952, an indictment (CDN 2a, 4a-7a; CYG 2a, 4a-12a) charged the petitioners with violating the Trading with the Enemy Act (50 U.S.C. App. 5(b)) and the Foreign Assets Control Regulations (Chapter V, Subtitle B, Title 31, Code of Federal Regulations) issued thereunder pursuant to Executive Order No. 9193 (App. 18-19). These Regulations (Sec. 500.201 *et seq.*; see Pet. App. 37 *et seq.*), which prohibited unlicensed financial transactions by, with or for the benefit of, directly or indirectly, nationals of Communist China, were issued by the Secretary of the Treasury on December 17, 1950, the day following the declaration of national emergency by the President because of the Korean conflict (Pet. App. 33-35), and while the 1949 and 1941 declarations of emergency were still in effect.[2]

China Daily News and Eugene Moy:—China Daily News, Inc. and Eugene Moy were found guilty of counts 1, 2, 4, 5, and 7 (CDN 4a-7a; 81a) which charged them with engaging in financial transactions with two Communist-controlled banks in Hong Kong, the Nanyang Commercial Bank, Ltd. and the Overseas Chinese Service, Bank of China. The transactions in-

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[2] The 1939 and 1941 national emergencies were terminated by the President on April 28, 1952 (Proclamation No. 2974, Pet. App. 35-36).

volved the extension of credit to these banks and receipt of payment from them for certain advertisements published in the China Daily News. Through these advertisements, the Hong Kong banks offered their services to receive remittances from overseas Chinese for transmittal to relatives and acquaintances on the China mainland.

The following evidence, unrebutted by petitioners since they did not offer any evidence (CDN 74a-75a), was introduced by the Government:

Petitioner China Daily News, Inc. is a New York corporation which published in New York a Chinese language newspaper known as China Daily News, with a daily circulation of 5,000-6,200 copies during 1950 and 1951. Petitioner Eugene Moy served as Editor and Managing Editor of the China Daily News (Exs. 2, 3, Gov. 34a-39a).

China Daily News had been publishing daily an advertisement of the Nanyang Commercial Bank, which advertised the services of this Hong Kong bank in remitting money to persons in mainland China (Ex. 14A, Gov. 7a, 40a). By letter dated January 5, 1951 (Ex. 6A, CDN 98a), the Nanyang Bank sent a $90 check to China Daily News in payment for a 3-month advertisement and the Nanyang Bank's account with China Daily News was credited (Ex. 5, CDN 96a) (Indictment Count 1).

China Daily News also received a letter (Ex. 7A, CDN 23a, 99a) from the Nanyang Bank, dated January 27, 1951, enclosing a $30 check in payment for the advertising from December 9, 1950, to January 9, 1951. The newspaper issued a receipt for the payment (Ex. 8, CDN 100a) and credited the Nanyang account (Ex. 5, CDN 96a) (Indictment Count 2).

Another letter from the Nanyang Bank, dated April 6, 1951, enclosed three checks totalling $90 in payment for the advertising from January 9, 1951, to April 9, 1951. This was credited to the Nanyang account on April 21, 1951 (Ex. 5, CDN 96a) (Indictment Count 4).

China Daily News continued to publish the advertisement and extended credit to the Nanyang Bank in the sum of $90 for the period from April 9, 1951, to July 9, 1951 (Ex. 5, CDN 96a) (Indictment Count 5). Payment for this was made on August 20, 1951, at which time the Nanyang account was again credited with $90.

In its issue of January 12, 1951, China Daily News published a purported news article (Ex. 25A, Gov. 47a), concerning the setting up by the Bank of China of an overseas Chinese service department for remittance of money to mainland Chinese. China Daily News notified the Bank of China that the news story had been printed and by letter dated February 16, 1951 (Ex. 16A, Gov. 44a), the Bank of China requested China Daily News to print it as an advertisement for three months. In fact, however, China Daily News had already published the news article as an advertisement on January 15, 1951, and it continued the advertisement daily until August 31, 1951 (Ex. 26A, Gov. 15a, 50a).

On March 1, 1951, China Daily News extended a credit to the Bank of China for $30 for a three months advertisement at the rate of $10 per month and opened a ledger sheet for the Bank of China as a record of it (Ex. 29, CDN 104a) (Indictment Count 7). The next day, China Daily News sent a letter to the Bank of China enclosing the newspaper clipping and an advertising bill of $30 (Ex. 27A, Gov. 52a). In its letter of March 13, 1951, the Bank of China inquired of China Daily

News how the bill was to be paid (Ex. 27A, Gov. 52a) and in a letter of April 23, 1951 (Ex. 28A, Gov. 53a), the Bank of China notified the newspaper, "As for the U. S. $30.00 advertising fee, we have no way of remitting to America from here. Please try to get some American overseas Chinese to pay you the money, and then write to us and notify us as to whom to pay the money and we will make payment accordingly."

On December 20, 1950, three days after the Secretary of the Treasury issued the Foreign Assets Controls Regulations pertaining to Communist China, one Louis K. C. Chang, New York representative of the Ho Cheng Bank of Chunking, China, visited Eugene Moy at the offices of China Daily News. Chang requested Moy to withdraw from the China Daily News a prior advertisement inserted therein by the Ho Cheng Bank. (CDN 27a-43a.) Change gave Moy a draft of a new advertisement and said, "I like to withdraw the previous advertisement because if that continued to appear in the paper it would be a violation of the Treasury regulation" (CDN 33a). Moy accepted the new advertisement and said, "O. K., we will run this amended advertisement for you" (CDN 33a). The new advertisement (Ex. 34A, CDN 107a), which was handed personally by Chang to Moy (CDN 33a), was published in the China Daily News for one week commencing December 23, 1950 (CDN 36a), and informed its readers that because of action by the Treasury Department the Ho Cheng Bank would cease handling "overseas Chinese remittances for the time being."

In a series of letters from the Hong Kong banks, written in early 1951 (Exs. 15A; 16A; 27A; 28A; Gov. 43a; 44a; 52a; 53a), the China Daily News was apprised of

the obstacles in transacting business with the Communist-controlled banks. Moreover, the China Daily News itself published a series of articles and news stories concerning the Foreign Assets Control Regulations.[3] One such article, a question and answer notice received from the Nanyang Bank on February 10, 1951 (Ex. 23A, Gov. 45a), read in part as follows:

> (1) . . . Checks should be made payable to the name of payee (your relative) in English. Send the checks to us. When received, we will represent the payee in withdrawing the money from the bank, and then we will forward the remittance to the payee.

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[3] Government exhibit 101 consisted of a series of news articles—continuing for almost a year beginning with the December 21, 1950, issue—which appeared in the China Daily News. The following are pertinent excerpts:

January 17, 1951 (released by the Canton City News Department):

> On December 16, 1950, the Government of the United States issued regulations to control within its territory the public and private assets of the People's Republic of China and also to prohibit all ships registered in the United States from going to Chinese ports, for the purpose of seizing Chinese assets by economic means, in addition to its military invasion of Taiwan and its bombing of our Northeast and of our mercantile marine.

April 4, 1951:

> U. S. Controls Foreign Assets Poses Difficulties For Banking Business.
>
> Besides the "embargo" of material, the U. S. Treasury Department has also issued "Foreign Assets Control Regulations" to freeze all assets in America belonging to persons from countries which can be looked upon as blocked nations. Therefore, transfers of credits or payments in U. S. dollars are prohibited if they directly or indirectly involve persons of blocked nations. The immense power given to these regulations has produced very serious and immense effect on agreements or loans. The banking business is therefore having difficulties.
>
> . . .

(2) In order to avoid difficulties in the cashing of the check, please be sure not to write the word China or any address in China on the remittance check.

. . .

. . . However, if remittance is made in Hong Kong dollars, please state on the back of the check: "This check payable to Nanyang Commercial Bank (write this on the back yourself)" (But be sure not to write this on the back of the check if it is in U. S. Dollar check).

Chin You Gon:—Petitioner Chin You Gon signed a statement admitting the following facts on which the charges were based (Ex. 77, CYG 134a-137a). During 1951 and 1952, he purchased many checks and money orders for remittance through the Nanyang Bank to persons in Communist China. These purchases were made not only on his own behalf but also for others, including petitioner Chin Hong Ming. Chin You Gon was informed by an American bank, when he applied to purchase the money orders, that remittances to persons in mainland China were prohibited. However, he deliberately gave the banks fictitious addresses in California and Massachusetts although he knew that in each case the checks would be sent to the Nanyang Bank in Hong Kong for transmittal to persons in Communist China. Chin You Gon personally mailed checks and money orders to the Nanyang Bank for payment to his family in mainland China.

Chin Hong Ming:—In a signed statement (Ex. 75, CYG 131a-133a), Ming admitted that he requested Chin You Gon to purchase certain checks. Chin You Gon purchased these checks by using fictitious addresses for the payees (CYG 136a); the checks were given to Ming who

sent them to the Nanyang Bank for remittance to his family in mainland China and the bank sent back receipts acknowledging transmittal to the relatives in China.[4]

ARGUMENT

1. Petitioners contend that the President did not delegate to the Secretary of the Treasury power to adopt the Foreign Assets Control Regulations of December 17, 1950, and that in any case the President could not constitutionally delegate this power in the form in which he did.[5]

(a) *The President delegated to the Secretary of the Treasury his power to impose these "freezing" regulations.*

By Executive Order 9193 (App. 18-19), the President clearly stated that *all* the "powers and authority" conferred upon him by Section 5(b) of the Trading with the Enemy Act, as amended, "are hereby delegated to Secretary of the Treasury, or any person, agency, or instrumentality, designated by him . . . ." Petitioners claim that this delegation is limited to World War II situations. But although the Executive Order was intended in part to deal with the problems of World War

[4] Petitioners do not argue that any Treasury Department license was issued for any of the transactions covered by the indictment.

[5] Executive Order 10348 of April 26, 1952, issued after the declaration of national emergency because of the Korean War (see Pet. App. 33-35), continued in force all prior delegations of the President's powers under the Trading with the Enemy Act. It is petitioners' contention that, for the Regulations in question to be valid, they should have been based on a new delegation of authority by the President following the Korean national emergency. Consequently, Executive Order 10348 renders moot—under petitioners' theory—the question of the validity of the Regulations after April 26, 1952.

II, its language is not so limited and there is no restriction or even reference to World War II or to any particular period or time. The delegation is a full one for the whole period during which the President might validly exercise powers under Section 5(b) of the Trading with the Enemy Act—and there is no question that during the particular period involved here (Dec. 1950-April 1952) those powers were still operative, since a national emergency had previously been proclaimed and was still in effect.

Aside from the breadth of the literal terms of the delegation, there are many indications, both on the face of Order 9193 and in related orders, that the delegation was not limited to World War II matters but encompassed all the Presidential powers under Section 5(b). Section 12 of the Order (App. 18-19) declared that any action taken by the delegates "shall be final and conclusive as to the power of such person . . . to exercise any of the power or authority conferred upon me by sections 3(a) and 5(b) of the Trading with the Enemy Act". The Order also made it clear that—despite petitioners' contrary contention (Pet. 14)—drastic controls could be imposed on countries other than those to which controls already applied in connection with World War II. Paragraph 11 reads in part: " . . . The Secretary of the Treasury shall consult with the Secretary of State before issuing any Order adding any additional foreign countries to section 3 of the Executive Order 8389, as amended." Executive Order 8389, as amended, designated certain foreign countries to which the freezing controls extended. By adding a country to section 3, assets in the United States would be frozen and financial transactions with its nationals would be blocked. Thus, it is

plain that the President contemplated that these controls could be extended to foreign countries not originally listed in Section 3, and, significantly, Executive Order 9193 was dated July 6, 1942, long after controls had been extended to all the countries to which they were applied in World War II.[6]

Petitioners also overlook the significance of subsequent Executive Order 9989 (App. 19-20), which provides that nothing therein "shall be deemed to limit or remove any powers heretofore conferred upon the Secretary of the Treasury. . . ." This Executive Order, issued on August 20, 1948, confers no new delegation on the Secretary of the Treasury but rather reaffirms a delegation previously made. The principal purpose of Order 9989 was to transfer to the Attorney General certain of the functions (not in issue here) which the Secretary performed under Section 5(b) of the Trading with the Enemy Act. If the President had intended, then or before, that the delegation contained in Order 9193 were to be limited to the World War II situation, the language of Order 9989 confirming the President's prior delegation to the Secretary of the

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[6] Petitioners contend (Pet. 14) that the freezing control regulations come under the heading of "foreign trade relations" and conclude that the Secretary of State, rather than the Secretary of the Treasury, should have been the agency through which the President exercised his powers under Section 5(b). This contention is obviously without merit. The President may act by any officer of his choice in the absence of a statute preventing him from so doing. Since the President has plenary power in the field of foreign affairs (*United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304), he can exercise this power through any agency he sees fit to use, and it would certainly be appropriate to institute and maintain freezing control regulations through the Treasury, acting in consultation with the State Department.

Treasury would be practically meaningless. The reasonable interpretation is that the President contemplated that the Secretary of the Treasury would have further duties in connection with future freezing controls.

Finally, there is no doubt, as a practical matter, that when the Foreign Assets Control Regulations were issued in December 1950 the then President intended the Secretary of the Treasury to exercise his powers under Section 5(b) in connection with the Korean crisis. In a letter dated July 29, 1950, the President gives his reasons for selecting the Secretary of the Treasury as his agent in this area, and states that he wishes the Secretary to exercise controls in the fields of "foreign assets, foreign exchange, and related fields." He also states that the Secretary of the Treasury should be prepared to act "as the need may arise," and indicates that the President considered that the Secretary had already been delegated full power to do so.[7] In point of fact, the regulations were issued by the Secretary of the Treasury on December 17, 1950, the day after the President's declaration of emergency which followed the Communist-Chinese invasion of Korea and immediately upon the heels of a State Department announcement made simultaneously with the declaration of emergency and which said that "The Departments of State and Commerce are issuing the necessary regulations" (see *supra,* p. 3). In Executive Order

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[7] "The White House
Washington

"My dear Mr. Secretary: July 29, 1950

"Consistent with the role of your Department in financial matters, it is my desire that you assume responsibility for the preparation and execution of any measures which may be necessary with regard to foreign assets, foreign exchange, and related fields. We

10348 of April 26, 1952 (Pet. App. 33), the President expressly "continued in force" "all delegations, designations, regulations . . . " issued under Order 9989. The Foreign Assets Control Regulations were, therefore, incidentally but expressly, ratified by the President. See footnote 5, *supra*, p. 9.

(b) *The President could delegate, in the form in which he did, his powers under Section 5(b) of the Trading with the Enemy Act.*

Petitioners also contend that the President cannot constitutionally delegate his powers under Section 5(b) "for such future need as might arise." This contention conflicts both with basic principles and with historical practice.

As has often been pointed out, in foreign affairs—the field of government involved here—the President's powers are plenary and his role is dominant. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304. Certainly, he may prepare for possible tension or conflict in the future and need not restrict himself to the immediate problems of the day. See *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 476. And it is indisputable that unless specifically prohibited he may exercise his functions, including those pertaining to foreign relations, through duly authorized subordinates. See 3 U. S. C. 301, 302; *United States* v. *Chemical Foundation*, 272 U. S. 1, 13. Under these principles, it was entirely proper for the President, contemplating that

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should be prepared to exercise controls in these fields without any delay as the need may arise. It is my understanding that you already possess full authority under the Trading with the Enemy Act to take any requisite steps.

"I am communicating copies of this letter to the Attorney General, because of his responsibility for vested foreign property and

Section 5(b) powers would continue to be needed, to grant the Secretary general and future authority under that statute. It has never been governmental practice or doctrine that separate delegations must be made for each particular situation as it arises. And even if that were the requirement, it would have been satisfied here by President Truman's actions at the time of the Korean crisis (*supra*, pp. 12-13).

Petitioners argue that the President's delegation of power must be made after a declaration of war or of national emergency. But it should be noted that under Section 5(b) it is only the powers that must be exercised, *not* the *delegation* of those powers, after the declaration of war or national emergency. In any case, the President's delegation here did occur after the declaration of a national emergency and during the existence of a state of war. The World War II emergency was in effect when Executive Order 9193 was issued in 1942 and it did not terminate until the President issued his Proclamation No. 2974 on April 28, 1952. See Pet. App. 28. Cf. *Ludecke* v. *Watkins*, 335 U. S. 160.

2. The Government agrees with petitioner Moy that the criminal sanctions of the Trading with the Enemy Act are applicable only to those officers of a corporation who wilfully and knowingly violate the regulations

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for remaining property blocked by the Treasury during World War II. I am also sending copies of this letter to the Secretary of State and to the Chairman of the National Security Resources Board, because of their interest in the broad policy considerations in this field.

"Very sincerely yours,

(signed) HARRY S. TRUMAN.

"HONORABLE JOHN W. SNYDER,
Secretary of the Treasury,
Washington, D. C."

issued thereunder. The indictment, contrary to Moy's assertion (Pet. 2), clearly charges him with such conduct. Hence, the question of "imposition of vicarious criminal liability" is not, as petitioner contends (Pet. 16), involved in this case.

That Moy was in a position of control or authority and exercised general supervision over the business of China Daily News, Inc. is apparent from the uncontroverted facts. As petitioners admit and as the record shows, Moy was a stockholder, the chairman of the Board of Directors, the Editor and the Managing Editor of a small newspaper. Not one iota of evidence was introduced to suggest that anyone else had any control, authority or supervision over the affairs of this newspaper. Accordingly, the correspondence and records of China Daily News were admissible against one in Moy's position. *United States* v. *Feinberg*, 140 F. 2d 592, 596 (C. A. 2), certiorari denied, 322 U. S. 726, and cases cited.

Moreover, the record contains more than substantial evidence that Moy knew of the Treasury Regulations and that the Hong Kong banks were nationals of China.[8] Mr. Chang, as representative of the Ho Cheng Bank, personally informed Moy of the Treasury Regulations, and the new advertisement he handed to Moy for publication in the China Daily News spoke of prohibitions against financial transactions "to and from the China mainland." Indeed, news stories printed in the China Daily News itself mentioned and criticized the Treasury Regulations. *Supra*, pp. 6-8.

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[8] The concurrence of both courts below on this factual issue precludes review here in the absence of an exceptional showing of error. *Delaney* v. *United States*, 263 U.S. 586, 589-590; *United States* v. *Johnson*, 319 U.S. 503, 518.

Also, the question and answer notice of the Nanyang Bank (concerning remittances to China from overseas Chinese), printed in the China Daily News, advised its readers, ". . . please be sure not to write the word China or any address in China on the remittance check. . . ." Letters sent to the China Daily News from the Bank of China in effect told the China Daily News that the bank was a "designated national" under the Regulations because it could not even send a mere $30 in payment for its advertisement. In fact, the Nanyang Bank and the Bank of China advertisements in the China Daily News, whereby these banks offered their services for transmittal of remittances to mainland Chinese, indicated they were acting for the benefit of Chinese nationals and thus within the definition of "designated nationals" (Regulations, Section 500.302 (a)(3)). The very insertion of the advertisements, which indicated that the Hong Kong banks were "designated nationals", either created a credit from China Daily News to the banks or resulted in a payment by the banks to China Daily News. In either event, a transaction occurred which is prohibited by the regulations. Certainly, Moy, who was Editor and Managing Editor of the newspaper, cannot claim ignorance.

3. The evidence also clearly proved the wilful violation of the regulations by petitioners Chin You Gon and Chin Hong Ming.

The signed statements of these petitioners give clear and undisputed proof that they knew it was illegal to send money to mainland China. They used the names of fictitious payees and fictitious addresses in the United States. They were readers of the China Daily News which published news reports, advertisements, and notices about the Government's blocking of financial

dealings with mainland China, together with suggestions for circumventing the regulations. Furthermore, these petitioners were affiliated with the China Daily News, Inc. As the court below summed up the evidence, "Each of the defendants repeatedly ignored the regulations so that their violations could be reasonably characterized as willful" (Pet. App. 28). The "two court" rule (footnote 8, *supra*, p. 15) applies to this issue as well.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WILLIAM F. TOMPKINS,
Assistant Attorney General.
HAROLD D. KOFFSKY,
CARL G. COBEN,
Attorneys.
JOSEPH P. BELLON.

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APPENDIX

Executive Order No. 9193, July 6, 1942 (7 F. R. 5205) as amended, so far as pertinent, provides:

> 3. Subject to the provisions of this Executive Order, all powers and authority conferred upon me by sections 3(a) and 5(b) of the Trading with the enemy Act, as amended, are hereby delegated to the Secretary of the Treasury or any person, agency, or instrumentality designated by him; . . . Except as otherwise provided herein, this Executive Order shall not be deemed to modify or amend Executive Order No. 8389, as amended, or the President's Proclamation of July 17, 1941, or Executive Order No. 8839, as amended, or the regulations, rulings, licenses and other action taken thereunder, or in connection therewith.
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> 11. . . . the Secretary of the Treasury shall consult with the Secretary of State before issuing any Order adding any additional foreign countries to section 3 of Executive Order No. 8389, as amended.
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> 12. Any orders, regulations, rulings, instructions, licenses or other actions issued or taken by any person, agency or instrumentality referred to in this Executive Order, shall be final and conclusive as to the power of such person, agency or instrumentality to exercise any of the power or authority conferred upon me by sections 3(a) and 5(b) of the Trading with the Enemy Act, as amended; and to the extent necessary and ap-

propriate to enable them to perform their duties and functions hereunder, the Secretary of the Treasury and the Alien Property Custodian shall be deemed to be authorized to exercise severally any and all authority, rights, privileges and powers conferred on the President by sections 3(a) and 5(b) of the Trading with the Enemy Act of October 6, 1917, as amended, and by sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941. No person affected by any order, regulation, ruling, instruction, license or other action issued or taken by either the Secretary of the Treasury or the Alien Property Custodian shall be entitled to challenge the validity thereof or otherwise excuse his actions, or failure to act, on the ground that pursuant to the provisions of this Executive Order, such order, regulation, ruling, instruction, license or other action was within the jurisdiction of the Alien Property Custodian rather than the Secretary of the Treasury or vice versa.

Executive Order No. 9989 (13 F. R. 4891), so far as pertinent, provides:

3. It is the policy of this order that administrative action under paragraph 1 hereof shall be taken by the Attorney General or any officer, person, agency, or instrumentality designated by him. However, nothing in this order shall be deemed to limit or remove any powers heretofore conferred upon the Secretary of the Treasury or the Attorney General by statute or by Executive order. No person affected by any order, regulation, ruling, in-

struction, license, or other action issued or taken by either the Secretary of the Treasury or the Attorney General may challenge the validity thereof or otherwise excuse his actions, or failure to act, on the ground that pursuant to the provisions of this Executive order, such order, regulation, ruling, instruction, license, or other action was within the jurisdiction of the Attorney General rather than the Secretary of the Treasury or *vice versa*.

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